Supreme Court, U.S.
FILED
MAY 30 2003
OFFICE OF THE CLERK

No. 02-1349

In the Supreme Court of the United States

JOSEPH MERLINO, AKA SKINNY JOEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a jury verdict finding the defendant guilty of a violation of the RICO statute, but noting that a particular predicate act was not proven, precludes the government from proving that predicate act in a subsequent prosecution for a different offense, when the district court in the first case instructed the jury that it was not required to be unanimous in order to find that the predicate act was not proven.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 310 F.3d 137. The opinion of the district court (Pet. App. 20a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2002. A petition for rehearing was denied on December 11, 2002. The petition for a writ of certiorari was filed on March 11, 2003. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of New Jersey returned an indictment charging petitioner with, *inter alia*, one count of conspiring to murder Joseph Sodano for the purpose of gaining entrance to, and maintaining and increasing position in, a racketeering enterprise, in violation of 18 U.S.C. 1959(a)(5); and one count of aiding and abetting the murder of Joseph Sodano for the same purpose, in violation of 18 U.S.C. 1959(a)(1) and (2). Petitioner filed a pre-trial motion to dismiss those counts under the Double Jeopardy Clause of the Fifth Amendment to the Constitution. The district court denied the motion to dismiss, Pet. App. 20a-36a, and the court of appeals affirmed, *id.* at 1a-19a.

1. Petitioner was the underboss of the Philadelphia La Cosa Nostra (LCN) Family. A federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner and others with violations of the RICO statute. Count 1 charged that petitioner and others conspired to participate in the conduct of the affairs of an enterprise through a "pattern of racketeering activity," in violation of 18 U.S.C. 1962(d). Pet. App. 2a. Count 2 charged that petitioner participated in the same enterprise through a "pattern of racketeering activity," in violation of 18 U.S.C. 1962(c). Pet. App. 2a-3a. Counts 1 and 2 alleged that petitioner agreed to commit and committed numerous predicate racketeering acts. *Id.* at 3a. Of relevance here, Act 4A alleged that petitioner conspired with others to murder Joseph Sodano, and Act 4B charged that petitioner and others aided and abetted the murder of Joseph Sodano. Pet. App. 23a.

During trial, the government presented testimony that Ralph Natale (then LCN Family boss) and peti-

tioner ordered the killing of Sodano. Petitioner and his co-defendants suggested that Sodano was murdered as part of a robbery committed by others. *Ibid.*

The district court provided the jury with a verdict sheet containing special interrogatories on the predicate racketeering acts. C.A. App. 73a-80a (copy of verdict sheet). The verdict sheet specified that the jury should decide whether the defendant was "guilty" or "not guilty" of the RICO offenses. If the jury concluded that the defendant was guilty, the verdict sheet instructed the jury to "identify which of the following Racketeering Acts or Collection of Unlawful Debt [it] unanimously find[s] as to this defendant." *Id.* at 73a. It then set forth each specific predicate violation and asked the jury to decide whether that violation was "proven" or "not proven." *Ibid.* Next, the verdict sheet asked the jury to determine whether the defendant was "guilty" or "not guilty" of the non-RICO charges. The end of the form contained a signature line for the jury foreperson, which is preceded by a statement that "[t]he unanimous verdict of the jury is as indicated above." *Id.* at 80a.

The district court referred to the interrogatories during its final instructions to the jury, and explained that:

> [f]or each defendant, you must unanimously agree as to the identity of two racketeering acts or one collection of unlawful debt which the defendant agreed that someone would commit. On the verdict sheet I will give you, you should indicate whether you find a racketeering act or a collection of unlawful debt to be proven beyond a reasonable doubt or not proven.
>
> And, the allegations from the indictment are there, directs you to the count, and then says, proven or

> not proven. And you will discuss and determine whether or not—and you'll check off which it is. If you check off not proven, not proven, not proven, not proven, each one you have to consider separately, each act.
>
> * * * * *
>
> When you review the indictment, you will see that the Government has alleged that the defendants carried out the RICO offenses charged in Counts 1 and 2 through 36 racketeering acts, 6 racketeering acts that involve acts of murder, attempted murder, or conspiracy to commit murder, 18 racketeering acts involving extortion in violation of State and Federal law, 3 racketeering acts involving gambling violations, 6 racketeering acts involving receipt of stolen property and 2 racketeering acts involving distribution of cocaine.

Pet. App. 3a-4a (emphasis omitted).

After two days of deliberations, the jury submitted the following question to the district court:

> Racketeering Acts. Once we determine that the defendant has committed one unlawful collection of debt or two or more racketeering acts, do we need to decide proven or not proven on all the racketeering acts?

Pet. App. 5a. The district court, without objection, responded "[y]es." *Ibid.*

Two days later, the jury submitted the following additional question to the district court:

> If, on a given racketeering act that has no bearing on the count decision we cannot come to a unani-

> mous decision, is it within the law to unanimously decide that the act is not proven?

Pet. App. 5a. Petitioner's counsel argued that the court's answer should be "yes," the racketeering act is "not proven" if the jury is "not able to reach a unanimous decision." C.A. App. 84a. The prosecutor disagreed, stating that the question should be answered "no," because the jury's inability to reach a unanimous decision on a particular racketeering act means that the jury is "hung." *Id.* at 85a. The district court agreed with defense counsel and answered the question "yes." *Id.* at 84a.

The government submitted a letter to the district court later that day, urging it to reconsider its answer to the jury's second question. The government reiterated its view that the correct response is to "tell the jury that if it cannot reach a unanimous agreement as to whether or not a RICO predicate is proven, it should mark the act 'hung' or 'undecided.'" Gov't C.A. Br. at 8 (quoting letter). The court did not change its response.

The jury returned a verdict finding petitioner guilty on RICO Counts 1 and 2. Pet. App. 6a. With respect to Count 1, the jury found that the government had "proven" that petitioner was responsible for six racketeering acts. *Ibid.* With respect to Count 2, the jury found that the government had "proven" that petitioner was responsible for five racketeering acts. *Ibid.* The jury found the remaining racketeering acts, including the acts relating to the Sodano murder, "not proven." *Ibid.*

2. A federal grand jury in the District of New Jersey subsequently returned an indictment charging petitioner and others with engaging in violent crime in aid of racketeering activity (the VICAR charges). Pet.

App. 6a. Count 17 charged that petitioner conspired with others to murder Joseph Sodano for the purpose of gaining entrance to and maintaining and increasing position in the North Jersey Crew of the Philadelphia LCN Family, an enterprise engaged in racketeering activity, in violation of 18 U.S.C. 1959(a)(5). Pet. App. 26a-27a. Count 18 charged that petitioner aided and abetted the murder of Joseph Sodano for the purpose of gaining entrance to and maintaining an increasing position in same enterprise, in violation of 18 U.S.C. 1959(a)(1) and (2). Pet. App. 27a.

Petitioner filed a pretrial motion to dismiss the VICAR charges based on the Double Jeopardy Clause. Petitioner argued that, under *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the Philadelphia jury's "not proven" determination with respect to the murder of Sodano collaterally estopped the government from seeking to reprove petitioner's involvement in that murder. Pet. App. 33a. The district court denied the motion. *Id.* at 20a-36a.

3. The court of appeals affirmed. Pet. App. 1a-13a. The court first noted that the Double Jeopardy Clause's prohibition against successive prosecution for the same offense is not implicated in this case. *Id.* at 7a. The court explained that because the "VICAR offense requires proof of an element that the RICO offense does not, and vice-versa, they are different offenses for the purposes of the Double Jeopardy Clause." *Ibid* (citing *Blockburger* v. *Untied States*, 284 U.S. 299, 304 (1932)).

The court of appeals then rejected petitioner's collateral estoppel claim. The court held that under *Ashe*, the Double Jeopardy Clause prohibits relitigation of an issue only when the jury has decided the issue in the defendant's favor through an acquittal. Pet. App. 9a. The court further observed that "an acquittal, in order

to bar future litigation, must be unanimous; a 'hung jury' does not bar future prosecutions." *Ibid.* Applying those principles, the court held that petitioner "cannot prove that the jury unanimously, or even by a majority, acquitted him of participation in Sodano's murder." *Id.* at 10a. The court explained that the district court's supplemental instruction to the jury that it should find a particular predicate act not proven when the jury could not come to a unanimous decision on that act "makes the jury's vote ambiguous." *Id.* at 11a. In particular, the court could not "tell from the face of the verdict sheet whether the vote was unanimously 'Not Proven' or whether the jury unanimously decided that they were unable to reach a unanimous decision as to 'Proven' or 'Not Proven,' *i.e.*, whether they were 'hung' on that issue." *Ibid.*

The court of appeals also rejected petitioner's reliance on this Court's decisions in *Sanabria* v. *United States*, 437 U.S. 54, 68-69 (1978), and *Fong Foo* v. *United States*, 369 U.S. 141, 142-143 (1962) (per curiam). Pet. App. 12a-13a. The court explained that those cases "hold that an erroneous legal foundation does not alter the binding [e]ffect of a unanimous acquittal," *id.* at 13a, but they do not address the antecedent question "whether an acquittal must be unanimous to have preclusive effect." *Id.* at 12a.

Judge Nygaard dissented. Pet. App. 14a-17a. He concluded that the jury's determinations that petitioner's involvement in the Sodano murder acts was not proven should be accepted at face value and treated as an acquittal. *Id.* at 16a.

ARGUMENT

Petitioner contends (Pet. 10-16) that the first jury's determination that petitioner's involvement in the

Sodano murder was not proven collaterally estopped the government from seeking to reprove his involvement in that murder. That contention is without merit and does not warrant review.

1. In *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), the Court held that the Double Jeopardy Clause "embodie[s]" the principle of collateral estoppel. "Collateral estoppel, or, in modern usage, issue preclusion, means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Schiro* v. *Farley*, 510 U.S. 222, 232 (1994). For purposes of the Double Jeopardy Clause, a valid and final judgment in favor of a defendant means an acquittal. *Sattazahn* v. *Pennsylvania*, 123 S. Ct. 732, 738 (2003); *United States* v. *Lanoue*, 137 F.3d 656, 662 (1st Cir. 1998) ("The [collateral estoppel] doctrine necessarily requires that the defendant was acquitted of at least some charge in the first prosecution before we can find that an issue was decided in his favor that might preclude the current prosecution.").

In federal criminal cases, a defendant is acquitted of an offense only when the jury *unanimously* concludes that the defendant is not guilty. See Fed. R. Crim. P. 31(a) (a jury's verdict "must be unanimous"). When a jury "cannot agree unanimously upon a verdict, the defendant is not acquitted." *Johnson* v. *Louisiana*, 406 U.S. 356, 363 (1972). A jury's failure to reach a unanimous verdict results in a "hung jury," which is not "the equivalent of an acquittal." *Richardson* v. *United States*, 468 U.S. 317, 325 (1984). Thus, while the Double Jeopardy Clause bars relitigation of any issue of ultimate fact determined by a unanimous acquittal, the Double Jeopardy Clause does not bar relitigation of an

issue of ultimate fact where the jury has hung. See *id.* at 325-326. "The burden is on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Schiro*, 510 U.S. at 233.

Applying those principles, to obtain the benefit of collateral estoppel, petitioner had the burden to show that he was unanimously acquitted of an offense and that the acquittal necessarily decided that he was not involved in the Sodano murder. Assuming arguendo that the Sodano murder should be viewed as a stand-alone offense because a jury finding in the government's favor would have increased the statutory maximum sentence, Pet. App. 15a-16a (Nygaard, J., dissenting), petitioner nonetheless failed to make the necessary showing. As the court of appeals explained, the district court's supplemental instruction to the jury that it should check "not proven" if it could not unanimously decide whether a particular act was proven made it impossible to determine whether the jury unanimously decided that petitioner was not involved in the Sodano murder or whether it hung on that issue. *Id.* at 11a. Because petitioner could not show that the jury unanimously concluded that he was not involved in the Sodano murder, he failed to establish a necessary prerequisite for application of the collateral estoppel component of the Double Jeopardy Clause.

2. Petitioner argues (Pet. 12-14) that the court of appeals was required to accept the jury's not proven determination at face value and ignore the ambiguity introduced by the district court's supplemental instruction. In petitioner's view (Pet. 17-18), the court of appeals' reliance on the district court's instruction violates the general principle that a jury's verdict may not be impeached. But *Ashe* makes clear that, in

determining whether jury resolved a particular issue, a court should consider the "pleadings, evidence, *charge*, and other relevant matter." 397 U.S. at 444 (emphasis added). *Ashe* involved a general verdict. But as the court of appeals explained (Pet. App. 10a), there is no basis for applying a different rule to a special verdict. The court of appeals therefore properly examined the district court's instruction to the jury in deciding the meaning of the jury's not proven determination.

Petitioner also argues (Pet. 19-20) that the court of appeals' decision makes it too difficult to obtain the benefit of collateral estoppel. That contention is without merit. In ordinary circumstances, a court will correctly instruct the jury that it has to be unanimous in order to conclude that a particular act was not proven. In such circumstances, a defendant will be able to establish from the face of the verdict that the jury was unanimous. As the court of appeals explained (Pet. App. 2a), it is only because of the "unusual circumstances of this case" that petitioner cannot show that the jury was unanimous when it marked the "Not Proven" box.

Petitioner's complaint about the difficulty of proving that the jury was unanimous is particularly unpersuasive on the facts of this case. When the jury asked whether it could mark "Not Proven" if it could not reach a unanimous decision on a particular act, the government urged the court to instruct the jury that it could not mark not proven unless it unanimously concluded that petitioner did not commit that act. Petitioner, by contrast, urged the court to instruct the jury it could mark "Not Proven" as long as the jury agreed that it could not come to a unanimous conclusion on that issue. Moreover, after the jury delivered its verdict, petitioner did not ask the court to poll the jury

on whether it had unanimously concluded that he was not involved in the Sodano murder. In those circumstances, petitioner is in no position to complain that the court of appeals' decision makes it too difficult for a defendant to obtain the benefit of collateral estoppel.

3. Petitioner also contends (Pet. 16) that the decision below conflicts with this Court's decisions in *Fong Foo* v. *United States*, 369 U.S. 141 (1962), and *Sanabria* v. *United States*, 437 U.S. 54 (1978). There is, however, no such conflict.

In *Fong Foo*, the district court ordered the jury "to return verdicts of acquittal as to all the defendants" for two arguably erroneous reasons. 369 U.S. at 142. After a "formal judgment of acquittal was subsequently entered," the government successfully obtained a writ of mandamus. *Ibid.* This Court reversed, holding that, even though the order directing the acquittal may have been "based upon an egregiously erroneous foundation," jeopardy terminated "with the entry of a final judgment of acquittal." *Id.* at 143.

In *Sanabria*, the district court issued an order after the close of all of the evidence excluding certain evidence presented by the government as exceeding the scope of the indictment. As a result of that ruling, the court entered a judgment of acquittal because of insufficient evidence. The government successfully appealed, but this Court reversed. The Court held that a "judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." 437 U.S. at 69.

Petitioner seeks to analogize this case to *Fong Foo* and *Sanbria* because this case also involves an erroneous legal ruling. The crucial distinction, however, is that the erroneous instruction in this case prevents a

court from deciding whether the jury has made a unanimous determination on an ultimate issue of fact at all or whether it has instead hung on the relevant issue. Neither *Fong Foo* nor *Sanbria* addresses whether a court should consider a district court's instruction for that distinct purpose. In contrast, *Ashe* expressly addresses that issue, and it makes clear that a court should consider the district court's instructions in deciding whether the jury has decided the issue whose relitigation the defendant seeks to foreclose.

4. Finally, the decision below does not raise any issue of general or recurring importance. Petitioner does not assert that the decision below conflicts with a decision of any other circuit. And as the court of appeals explained (Pet. App. 2a), its decision ultimately depends on "the unusual circumstances of this case."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MICHAEL CHERTOFF
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

MAY 2003